IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. DAVID L. TAYLOR, JR., Defendant.	No. CR97-0001-LRR ORDER ***NOT FOR PUBLICATION***

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I. INTRODUCTION

This matter is before the court on the defendant's motion for a new trial based on newly discovered evidence (Docket No. 192). The defendant filed such motion pursuant to Federal Rule of Criminal Procedure 33. Also before the court are the defendant's "motion for evidentiary hearing" (Docket No. 193), "motion for the court to order the government to show cause or rule as a matter of law for the defendant" (Docket No. 196), and motion "to amend [the] Rule 33 motion for [a] new trial to include in the alternative a sentence reduction" (Docket No. 214). For the following reasons, the motion for a new trial based on newly discovered evidence, motion for an evidentiary hearing, motion to show cause or rule as a matter of law, and motion to amend shall be denied.

II. BACKGROUND

On January 22, 1997, the government filed a three-count indictment against the defendant. On February 21, 1997, the court appointed David Nadler to represent the defendant.[1] On March 21, 1997, the defendant filed a motion to suppress evidence. On March 24, 1997, the government filed a resistance to the defendant's motion to suppress evidence. On April 16, 1997, the court allowed David Nadler to withdraw as counsel and appointed Brad Driscoll to represent the defendant.[2] On May 23, 1997, the court held a hearing regarding the defendant's oral request to appoint substitute counsel. On May 27, 1997, the court denied such request. On May 28, 1997, the defendant filed an application to dismiss counsel. On June 2, 1997, the court denied the defendant's motion to suppress

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[1] David Nadler represented the defendant from February 21, 1997 to April 16, 1997. The court permitted David Nadler to withdraw as counsel because a conflict of interest developed.

[2] Brad Driscoll represented the defendant from April 21, 1997 to December 3, 1997.

evidence. On June 4, 1997, the court denied the defendant's application to dismiss counsel. On June 26, 1997, the defendant filed another application to dismiss counsel. On July 3, 1997, the court held a hearing regarding the defendant's June 26, 1997 application to dismiss counsel. On the same day, the court denied the defendant's application to dismiss counsel. Although a jury trial was scheduled for July 8, 1997, the defendant failed to appear for such trial.

On August 6, 1997, the government filed a four-count superseding indictment against the defendant. Count one of the superseding indictment charged the defendant with conspiracy to distribute and possess with intent to distribute 50 grams or more of crack cocaine.[3] Count two of the superseding indictment charged the defendant with possession with intent to distribute approximately 31.08 grams of crack cocaine.[4] Count three of the superseding indictment charged the defendant with failure to appear as required.[5] And, count four of the superseding indictment sought the forfeiture of $1,489.00 which had been seized.[6] On September 30, 1997, the defendant's jury trial commenced. On October 1,

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[3] The conduct charged in count one of the superseding indictment is in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(B) and 21 U.S.C. § 846.

[4] The conduct charged in count two of the superseding indictment is in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B).

[5] The conduct charged in count three of the superseding indictment is in violation of 18 U.S.C. § 3146(a)(1).

[6] The conduct charged in count four of the superseding indictment is in violation of 18 U.S.C. § 853.

1997, the jury found the defendant guilty of count one, count two and count four of the superseding indictment.[7]

On October 7, 1997, the defendant filed an "application to proceed pro se with standby counsel." On October 23, 1997, the defendant, proceeding pro se, filed a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. In such motion, the defendant asserted: 1) the court abused its discretion when it allowed a gun to be admitted into evidence and when it selected the jury; 2) the prosecutor engaged in misconduct when introducing the gun, offering prejudicial remarks about such gun and allowing Lacy Snead to testify falsely; and 3) trial counsel provided ineffective assistance. With respect to his ineffective assistance of counsel claim, the defendant argued counsel did not provide effective assistance because he failed to: a) object to a jury pool that had no minorities; b) file a pre-trial motion challenging the admissibility of highly prejudicial evidence; c) provide or discuss Grand Jury testimony of government witness Lacy Snead which would have shown he presented false testimony; d) question or interview a key defense witness until the day of trial; and e) meet with him more than three or four times before trial commenced.

On December 1, 1997, the court held a hearing regarding the defendant's October 7, 1997 "application to proceed pro se with standby counsel." Although frequently cautioned by the court, the defendant insisted on representing himself through his post-trial proceedings. On December 3, 1997, the court granted the defendant's "application to proceed pro se with standby counsel" and appointed a different attorney to serve as standby counsel because of the ineffective assistance of counsel claims raised by the defendant in

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[7] Prior to trial, the court severed the failure to appear count, or count three, from the drug counts, or count one and count two. Before the defendant's sentencing, the court dismissed without prejudice the failure to appear count.

his motion for a new trial. Charles Nadler replaced Brad Driscoll and served only as standby counsel.[8]

On October 27, 1997, the government resisted the defendant's motion for a new trial. On November 14, 1997, the defendant filed a memorandum in support of his motion for a new trial. On December 1, 1997, the defendant filed a motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c). In such motion, the defendant claimed the prosecutor engaged in misconduct and the court abused its discretion. On December 11, 1997, the government filed a memorandum in support of its October 27, 1997 resistance. On December 30, 1997, the defendant filed an amendment to his memorandum in support of his motion for a new trial and brief in support of his motion for judgment of acquittal.

On April 3, 1998, the court held an evidentiary hearing on the defendant's motion for a new trial. On May 13, 1998, the court heard oral arguments regarding the defendant's motion for a new trial. On May 27, 1998, the defendant filed a motion to dismiss his standby counsel. On June 10, 1998, the defendant filed a motion to renew and amend his motion for judgment of acquittal based on evidence pertaining to Doug Larson's testimony. On June 26, 1998, the court encouraged the defendant to give serious consideration as to whether he wanted to proceed pro se and denied the defendant's motion to dismiss his standby counsel. On July 13, 1998, the court held another evidentiary hearing on the defendant's motion for a new trial. On the following day, the court reviewed all of the defendant's claims, including his ineffective assistance of counsel claim, and denied the defendant's motion for a new trial and motion for judgment of

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[8] Charles Nadler continued to serve as standby counsel throughout the post-trial proceedings. On appeal, it appears Charles Nadler either represented the defendant or continued to function only as standby counsel.

acquittal. Before denying those motions, the court briefly outlined the testimony that was presented at trial:

> The evidence in this case shows that a search warrant was executed on March 20, 1996, at 2129 North Towne Lane N.E., Apt. 10, Cedar Rapids, Iowa. During the execution of the search warrant, the defendant was found in a bedroom in which more than 31 grams of crack cocaine was discovered under a mattress. Additionally, several guns were seized from the bedroom. Officer Doug Larison testified at trial that he interviewed the defendant at the scene. According to Officer Larison, the defendant admitted that he was holding the crack cocaine for Raymond Washington. [The defendant] also admitted that he was a heavy user of crack cocaine.
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> In addition to [the] discovery of the drugs and [the defendant's] confession, there was other evidence that implicated [the defendant] in drug dealing. Several cooperating witnesses testified against [the defendant]. Tally Morales testified that she had personally purchased crack cocaine on a number of occasions from the defendant. Lacy Snead was also a government witness who testified that he was the defendant's drug supplier. Mr. Snead's testimony was particularly incriminating because he also was able to identify a sheet of paper which had been seized from him by police officers. The paper was shown to be Snead's drug ledger. The defendant's nickname "B.C." (which stands for Bone Crusher) appears on that ledger as owing Mr. Snead $2,000. This ledger obviously corroborates Lacy Snead's testimony about his sales to the defendant. In addition, Lacy Snead's brother, Glendale Snead, also testified that he assisted his brother in his drug dealing and on occasion had delivered drugs to "B.C."
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> In summary, the government had an extremely strong case. They had the testimony of three cooperating witnesses, a drug ledger with the defendant's nickname on it, the seizure of over an ounce of crack cocaine in a bedroom in which there was

> strong evidence the defendant was living, and the defendant's own admission that he was holding the crack cocaine for another individual.

On August 11, 1998, the court conducted a sentencing hearing. At such hearing, the court sentenced the defendant to 324 months imprisonment and 4 years supervised release.[9] On the following day, the court entered judgment against the defendant. On August 14, 1998, the defendant filed a timely appeal.

On April 14, 1999, the Eighth Circuit Court of Appeals affirmed the defendant's conviction and resulting sentence. *See United States v. Taylor*, 175 F.3d 1026, 1999 U.S. App. LEXIS 7203, 1999 WL 220103 (8th Cir. 1999). On appeal, the Eighth Circuit Court of Appeals considered:

> [whether] the trial court erred in denying [the defendant's] motion for a new trial, [whether] the government violated [the defendant's] due process rights by withholding exculpatory material, and [whether] the trial court erred in denying [the defendant's] motion to dismiss his counsel before trial.

Id. With respect to the defendant's first argument, the Eighth Circuit Court of Appeals stated:

> [the defendant's] motion for a new trial was unusual in that it was made on the ground that he had been denied the right to the effective assistance of counsel secured by the Sixth

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[9] Relying on the United States Sentencing Guidelines, the court imposed a 324-month term on count one and a 324-month term on count two. Both terms were ordered to run concurrently. The court sentenced the defendant based on a total offense level of 38 and a criminal history category of IV. Before reaching the total offense level of 38, the court determined: 1) the base offense level should be 34 pursuant to U.S.S.G. § 2D1.1; 2) two levels should be added pursuant to U.S.S.G. § 2D1.1(b)(1); and 3) two levels should be added pursuant to U.S.S.G. § 3C1.1. Utilizing U.S.S.G. § 4A1.1, the court determined the defendant's criminal history to be IV.

> Amendment to the Constitution. Ordinarily, such motions are made post-appeal under 28 U.S.C. § 2255; but in this instance the trial court held more than one hearing on the motion in the belief, correct we think, that this kind of claim may be heard and determined in the context of a post-trial motion for a new trial. *See United States v. Smith*, 62 F.3d 641, 650-51 (4th Cir. 1995). After a full consideration of the matter, the trial court denied the motion, ruling that [the defendant's] counsel did in fact provide him with effective representation. The trial court's thorough opinion and careful scrutiny of the record make it unnecessary for us to visit this issue in any detail. We are satisfied after our own examination of the record that there is no error of law or fact in the trial court's conclusion that the ineffective assistance claim ought to be denied.

Id. Concerning the defendant's second argument, the Eighth Circuit Court of Appeals stated:

> *Brady v. Maryland*, 373 U.S. 83, 87 (1963), requires the government to provide a defendant with any exculpatory material that it may have in its possession so that the defendant may make use of it at trial. [The defendant] maintains that the government failed to provide him with details about the manner in which one of the witnesses against him had cooperated with the government in drug investigations in the past. But [the defendant] did know that the witness had cooperated, and effective use of that fact was made on cross-examination. Such details as [the defendant] subsequently learned about that cooperation would not, we are satisfied, have had an effect on the jury's verdict, in light of the extensive cross-examination of the relevant witness that did occur and the weight of the other evidence against [the defendant].

Id.[10] And, with regard to the defendant's third argument, the Eighth Circuit Court of Appeals stated: "our reading of the record convinces us that the trial court committed no error in denying [the defendant's] motion to dismiss counsel before trial." *Id.*

On July 2, 1999, the defendant filed a motion for a new trial based on newly discovered evidence and a motion for an evidentiary hearing. The newly discovered evidence relates to Tally Morales, a government witness. Specifically, the defendant avers:

> The prosecutor mailed a letter to the undersigned [. . .] indicating that witness Tally Morales [. . .] had been paid money and had a probation revocation [petition] dismissed. This newly discovered evidence combined with the undisclosed details raised at the [defendant's] sentencing about the manner in which Tally Morales had cooperated with the government in [its] drug investigation against the Sneads [rises] to the level of granting a new trial.

The government letter referred to by the defendant is dated January 11, 1999 and states:

> In late December, I had a meeting with a member of the DEA Task Force regarding a number of investigations in which Tally Morales may testify as a witness. During the meeting, I told the Task Force Officer that I again would need a full set of her prior debriefings, criminal history, any information regarding payments or other benefits she had received pursuant to her cooperation. I told the agent based upon my past requests and responses provided by the DEA Task Force that it was my understanding that she had not been paid or received

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[10] Although it is not clear from the Eighth Circuit Court of Appeals's discussion of the *Brady* claim, it is clear from the pleadings filed in support of the motion for a new trial based on newly discovered evidence that the Eighth Circuit Court of Appeals, before rejecting his *Brady* claim, addressed the defendant's concerns about Tally Morales' testimony in light of a "non-disclosed document" that showed all of the controlled buys between Tally Morales and the Sneads.

> any monetary benefit based upon her cooperation with DEA in the past.
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> In response, the Task Force Officer corrected me and informed me that he believes she had been paid at some point for moving and other [expenses related] to her cooperation. I directed that he obtain [payment records] and the reasons Ms. Morales received payment so it could be disclosed to defense counsel.
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> The DEA Task Force verified that the Iowa Division of Narcotics Enforcement had expended $990.00 on April 28, 1997 to pay for the expense of moving Ms. Morales after she received threats. The DEA Task Force also told me that in July [of] 1997 one of the Task Force Officers gave $275.00 of his personal funds to Ms. Morales' landlord to assist in keeping Ms. Morales from being evicted. The Task Force Officer stated [that,] although he considered this a personal loan, he has not been repaid by Ms. Morales. [. . .].
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> On January 5, 1999, I had a meeting with members of the DEA Task Force to develop a system which would ensure any benefit, including any nonmonetary benefit, received by a cooperating individual is documented and disclosed. During the course of this meeting, I learned that the Black Hawk County Attorney's Office had dismissed a probation revocation petition and was also reminded that it had initially delayed the hearing on that matter to give Ms. Morales the opportunity to cooperate with [the] DEA.
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> At the time of trial I was unaware of the above payments and the dismissal of the probation revocation petition. Had I known of them, they would have been disclosed to you.

To support his motion for a new trial based on newly discovered evidence, the defendant cites *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and several cases applying *Brady*.

On December 3, 1999, the defendant filed a supplemental brief in support of his motion for a new trial based on newly discovered evidence. Once again, the defendant relies on cases applying *Brady* to support his motion for a new trial based on newly discovered evidence. On June 5, 2000, the defendant filed a "motion for the court to order the government to show cause or rule as a matter of law for the defendant." On June 7, 2000, the government resisted the motion for a new trial by arguing that the newly discovered evidence would not have affected the judgment of the jury. On June 30, 2000, the defendant filed a reply. In his reply, the defendant utilized the same case law that he relied upon in his two prior pleadings. On January 10, 2002, the defendant filed a "motion "to amend [the] Rule 33 motion for [a] new trial to include in the alternative a sentence reduction."

The court now turns to consider the defendant's motion for a new trial based on newly discovered evidence, motion for an evidentiary hearing, motion to show cause or rule as a matter of law, and motion to amend his Rule 33 motion to include as an alternative a sentence reduction.

III. LEGAL ANALYSIS

A. Standard of Review

A district court may grant a motion for a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33. A motion for a new trial may be grounded on various reasons, including newly discovered evidence. *Id.* Nonetheless, "[m]otions for a new trial based on newly discovered evidence are disfavored." *United States v. Dogskin*, 265 F.3d 682, 685 (8th Cir. 2001) (citing *United States v. Jones*, 34 F.3d 596, 600 (8th Cir. 1994)). *See also United States v. Johnson*, 114 F.3d 808, 817 (8th Cir. 1997) (describing motion for a new trial based on newly discovered evidence as a disfavored motion); *United States v. Doyle*, 60 F.3d 396, 398 (8th Cir. 1995) (same); *United States v. Richards*, 967 F.2d

1189, 1196 (8th Cir. 1992) (same); *United States v. Liebo*, 923 F.2d 1308, 1313 (8th Cir. 1991) (same); *United States v. Pope*, 415 F.2d 685, 691 (8th Cir. 1969) (recognizing motions for a new trial based on newly discovered evidence are looked upon with disfavor); *Connelly v. United States*, 271 F.2d 333, 343 (8th Cir. 1959) (same). A motion for a new trial based upon allegations of newly discovered evidence will only be granted if a defendant proves "that the evidence was first discovered after trial, that his failure to discover the evidence before trial was not due to his lack of diligence, that the new evidence is material, that it is more than cumulative or impeaching, and that it is likely to produce an acquittal if a court grants a new trial." *United States v. Swayze*, 378 F.3d 834, 837 (8th Cir. 2004) (citing *Dogskin*, 265 F.3d at 685). *See also United States v. Yerkes*, 345 F.3d 558, 562 (8th Cir. 2003) (listing criteria for granting a new trial based on newly discovered evidence); *United States v. Duke*, 255 F.3d 656, 659 (8th Cir. 2001) (same); *United States v. Zuazo*, 243 F.3d 428, 431 (8th Cir. 2001) (same); *United States v. Dittrich*, 204 F.3d 819, 821 (8th Cir. 2000) (same); *Johnson*, 114 F.3d at 816 (same); *United States v. Willis*, 89 F.3d 1371, 1380 (8th Cir. 1996) (same); *United States v. Kern*, 12 F.3d 122, 126 (8th Cir. 1993) (same); *United States v. LaFuente*, 991 F.2d 1406, 1408 (8th Cir. 1993) (same); *United States v. Provost*, 969 F.2d 617, 620 (8th Cir. 1992) (same); *United States v. Conzemius*, 611 F.2 695, 696 (8th Cir. 1979) (same); *United States v. Carlone*, 603 F.2d 63, 66-67 (8th Cir. 1979) (same); *United States v. Cardarella*, 588 F.2d 1204, 1205 (8th Cir. 1978) (same); *United States v. Frye*, 548 F.2d 765, 769 (8th Cir. 1977) (same); *United States v. Ward*, 544 F.2d 975, 977 (8th Cir. 1976) (same); *Johnson v. United States*, 32 F.2d 127, 130 (8th Cir. 1929) (same). Generally speaking, district courts are afforded broad discretion when considering whether to grant a defendant's motion for a new trial based on newly discovered evidence. *See LaFuente*, 991 F.2d at 1408; *Provost*, 969 F.2d at 620; *Liebo*, 923 F.2d at 1313; *United States v.*

Begnaud, 848 F.2d 111, 113 (8th Cir. 1988); *United States v. Massa*, 804 F.2d 1020, 1022 (8th Cir. 1986); *Ward*, 544 F.2d at 977; *United States v. Stewart*, 445 F.2d 897, 899 (8th Cir. 1971). With those well established standards in mind, the court turns to consider whether the evidence offered by the defendant merits the granting of a new trial.

B. Review of the Motion for a New Trial Based on Newly Discovered Evidence[11]

The defendant argues he is entitled to a new trial based on newly discovered evidence. Specifically, the defendant contends he should be granted a new trial because the government informed him after his trial concluded that government witness Tally Morales had received several benefits, including a payment made on her behalf for moving expenses, a payment made on her behalf for rent and the dismissal of a probation revocation petition. In response, the government argues the defendant's motion for a new trial based on newly discovered evidence should be denied because the evidence is merely cumulative or impeaching, is not likely to produce an acquittal if the court grants a new trial and is not material.

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[11] From the pleadings submitted in support of his motion for a new trial based on newly discovered evidence, it appears the defendant is asserting a *Brady* violation or arguing he is entitled to a new trial based on the government's failure to disclose evidence. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963) (holding the government's failure to disclose evidence that is both favorable to the accused and material to guilt or punishment violates due process). To the extent the defendant is making such assertion or argument, the court declines to consider it. Given the facts relied on by the defendant, the court does not believe it is appropriate to allow him to recast his motion for a new trial based on newly discovered evidence as a motion for new trial based on a *Brady* violation. Stated differently, it is clear the government did not suppress or withhold evidence from the defendant that was favorable and material to his defense because the government discovered the new evidence in late December of 1998 and early January of 1999 (over two years after his jury trial concluded) and informed the defendant of such discovery on January 11, 1999.

1. Cumulative or Impeaching

Throughout his pleadings, the defendant clearly contends or admits the newly discovered evidence, that is, the two payments made on Tally Morales' behalf and the dismissal of a probation revocation petition, could have been used to further impeach Tally Morales. Newly discovered impeachment evidence is not an appropriate basis for granting a new trial. *See Yerkes*, 345 F.3d at 563 (finding "[the newly discovered evidence], at best, would have impeached the government's witnesses who testified [. . ., and] this is not sufficient to merit a new trial"); *United States v. Librach*, 609 F.2d 919, 922 (8th Cir. 1979) (concluding trial court correctly denied motion for new trial because "the newly discovered evidence represents impeachment material affecting the credibility of prosecution witnesses, not evidence pertaining to the quality and nature of [defendant's] conduct bearing on guilt or innocence); *United States v. Carter*, 549 F.2d 1164, 1165 (8th Cir. 1977) (determining a new trial was not warranted because the only arguable beneficial effect derived from the newly discovered evidence was that it tended to impeach a witness's credibility). Moreover, the new evidence concerning Tally Morales is merely cumulative because she testified at trial about her: 1) use of illegal drugs; 2) use of aliases to deceive others; 3) prior convictions or involvement in various crimes of deceit; 4) prior prison stays and desire to avoid future imprisonment; 5) numerous probation violations; and 6) ability to avoid conspiracy charges or escape prosecution in exchange for cooperating with the government. *Cf. Carter*, 549 F.2d at 1165 ("[I]n view of the evidence concerning [the witness] being paid by the government, the charges against her being dropped, her prostitution activities, and her poor reputation for truthfulness, the statement [or newly discovered evidence] would be cumulative."). Accordingly, the defendant's motion for a new trial based on newly discovered evidence fails.

2. Likely to Produce an Acquittal if the Court Grants a New Trial

Tally Morales also testified in other trials, including *United States v. Knight*, C97-0026-MJM (N.D. Iowa 1998). In that case, the court addressed a motion for a new trial based on the same newly discovered evidence that is at issue in the instant case, and the court concluded that such motion should be denied because two of the five criteria (evidence is not merely cumulative or impeaching and evidence is likely to produce an acquittal if a new trial is granted) necessary to grant a new trial had not been met. *Id.* On direct appeal, the Eighth Circuit Court of Appeals reviewed the court's denial of the motion for a new trial based on newly discovered evidence. *United States v. Knight*, 230 F.3d 1086 (8th Cir. 2000). Before affirming the court, the Eighth Circuit Court of Appeals stated:

> Mr. Knight maintains, finally, that the district court should have granted his motion for a new trial based on newly discovered evidence. After his trial, the government disclosed to Mr. Knight's counsel that one of the prosecution witnesses had previously received $1,273[12] in moving and rental expenses from government agents, and had obtained the dismissal of a probation revocation charge, in exchange for her cooperation. The district court denied Mr. Knight's motion for a new trial based on this evidence, and we review that refusal for an abuse of discretion.
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> For Mr. Knight to receive a new trial he must show, among other things, that the new evidence would probably produce an acquittal in a new trial. The district court noted the government had a strong case even without the testimony of the witness and that her credibility had already been severely

[12] Although this court and the Eighth Circuit Court of Appeals reported the total amount received from government agents as $1,273.00, it appears, based on the government letter, that the correct amount is $1,265.00.

> damaged by her admissions that she was a former prostitute and a heavy drug user. The district court concluded that the new evidence would not have changed the result in Mr. Knight's trial and we detect no abuse of discretion in that conclusion.

Id. at 1088 (internal citations omitted).

Here, the defendant does not demonstrate that the outcome of a new trial would probably result in an acquittal. *See Yerkes*, 345 F.3d at 562-63 (concluding defendant was not entitled to a new trial because he could not show his newly discovered evidence was likely to lead to an acquittal); *Duke*, 255 F.3d at 659 (concluding trial court did not abuse its discretion when it found newly discovered evidence was not credible and unlikely to produce an acquittal in the event of a new trial); *United States v. McMahan*, 852 F.2d 337, 339 (8th Cir. 1988) (affirming trial court's decision denying motion for a new trial because the newly discovered evidence presented by defendant was not the type that would probably produce an acquittal in a new trial); *United States v. Van Maanen*, 547 F.2d 50, 52-53 (8th Cir. 1976) (determining it was appropriate to deny defendant's motion for a new trial based on newly discovered evidence because it was improbable that a reversal would result on retrial). The jury had already heard about Tally Morales' agreement with the government and her own admissions on direct examination and cross examination severely damaged her credibility. Further, there was overwhelming evidence introduced at trial which showed that the defendant conspired to distribute crack cocaine. Thus, even if the newly discovered evidence had been presented to the jury, it is unlikely to have led to an acquittal. *Cf. Knight*, 230 F.3d at 1088 (concluding newly discovered evidence, that is, moving and rental payments on a government witness' behalf and dismissal of a government witness' probation revocation charge, would probably not produce an acquittal in a new trial); *Carter*, 549 F.2d at 1165 (noting that, on direct appeal, "it characterized

the evidence of guilt as 'overwhelming'" and finding "it extremely doubtful that the [newly discovered evidence] would produce an acquittal on retrial, particularly since the government's case rested upon the testimony of another witness"). Thus, it is appropriate to deny the defendant's motion for a new trial based on newly discovered evidence.[13]

IV. CONCLUSION

For the foregoing reasons, the defendant's motion for a new trial based on newly discovered evidence shall be denied. With respect to his motion for an evidentiary hearing, the record is clear and an evidentiary hearing would not change the court's conclusions. *See Begnaud*, 848 F.2d at 113 ("The decision whether to hold [an evidentiary] hearing is within the broad discretion of the district court."). Accordingly, the defendant's motion for an evidentiary hearing shall be denied. Similarly, given the government's resistance and the court's conclusions regarding the defendant's motion for a new trial based on newly discovered evidence, the defendant's "motion for the court to order the government to show cause or rule as a matter of law for the defendant" shall be denied as moot. Finally, having determined that it is appropriate to deny the defendant's motion for a new trial based on newly discovered evidence, the court deems it appropriate to deny the defendant's motion "to amend [the] Rule 33 motion for [a] new trial to include in the alternative a sentence reduction." Moreover, assuming it could reduce his sentence,

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[13] The court need not address the defendant's argument that the newly discovered evidence is material because the defendant failed to satisfy two elements necessary to justify a new trial: that the newly discovered evidence be more than cumulative or impeaching and that it be likely to produce an acquittal if a court grants a new trial. Nonetheless, the court notes that the newly discovered evidence is probably material in that it would have aided him when cross examining Tally Morales. Although she played a minor role in the defendant's trial, Tally Morales' testimony was material to the defendant's guilt. *Cf. Dittrich*, 204 F.3d at 822 (concluding defendant failed to satisfy that the newly discovered evidence be material and likely to produce an acquittal).

the court does not believe a sentence reduction is warranted, especially considering the court substantially discounted Tally Morales' testimony and generously gave the defendant the benefit of the doubt at his sentencing. Accordingly, the defendant's motion to amend shall be denied.

IT IS THEREFORE ORDERED:

1) The defendant's motion for a new trial based on newly discovered evidence (Docket No. 192) is denied.

2) The defendant's "motion for evidentiary hearing" (Docket No. 193) is denied.

3) The defendant's "motion for the court to order the government to show cause or rule as a matter of law for the defendant" (Docket No. 196) is denied.

4) The defendant's motion "to amend [the] Rule 33 motion for [a] new trial to include in the alternative a sentence reduction" (Docket No. 214) is denied.

DATED this 28th day of April, 2005.

LINDA R. READE
JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA